49

(2)

No. 06-1158

FILED
MAR 2 6 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

RODGER STROUP, Director, South Carolina Department of Archives and History, STATE OF SOUTH CAROLINA, ex rel Henry McMaster, Attorney General for the State of South Carolina,

Petitioners,

v.

THOMAS LAW WILLCOX, JOHN M. WILLCOX and KATHRYN WILLCOX PATTERSON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

Kenneth C. Krawcheck
Counsel of Record
KRAWCHECK AND DAVIDSON, LLC
9 State Street
Charleston, South Carolina 29401
(843) 577-2577

Counsel for Respondents

THE LEX GROUP^{DC} • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 11

ARGUMENT 12

I. THE DECISION OF THE COURT OF APPEALS DOES NOT VIOLATE *ERIE RR v. TOMPKINS* 12

II. THE COURT OF APPEALS CORRECTLY DETERMINED SOUTH CAROLINA STATE LAW 21

A. The Court Of Appeals did not erroneously depart from the Findings of Fact of the Bankruptcy Court 21

B. There is no South Carolina Case Law that Supports the Proposition that Governor's Records are Public Records 23

C. There is no Statutory Authority that Governor's Records are Public Property 24

D. Respondent's Defenses Bar the State's Claims 24

III. THE COURT OF APPEALS' REFUSAL TO CERTIFY STATE LAW QUESTIONS DOES NOT CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT AND OTHER COURTS OF APPEAL 25

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

CASES

Collins v. Bankhead,
1 Strob. 25 (S.C. 1846) 14

Elliott v. Wilson,
181 S.C. 406, 187 S.E. 825 (1936) 14

Erie R.R. v. Tompkins,
304 U.S. 64 (1938) ..... *passim*

Ex Parte Dort,
238 S.C. 506, 121 S.E.2d 1 (1961) 14

Folsom v. Marsh,
9 F. Cas. 342 (C.C.D. Mass. 1841) 20

Hammond v. Halsey,
287 S.C. 46, 336 S.E.2d 495 (S.C. App. 1985) 14, 17

Leavitt v. United States,
518 U.S. 37 (1996) 21

Lehman Bros. v. Schein,
416 U.S. 386 (1974) 27

Markham v. City of Newport News,
292 F.2d 711 (4th Cir. 1961) 13

Marshall v. Marshall,
547 U.S. 293 (2006) 13

Nixon v. Administrator of General Services,
433 U.S. 425 (1977) 20

Nixon v. United States,
978 F.2d 1269 (D.C. Cir. 1992) 20

North Carolina v. West,
235 S.E.2d 150 (N.C. 1977) 15, 18, 20

Pinckney v. Henegan,
33 S.C.L. 250, 2 Strob.
250 (S.C. App. L. 1848) 23

State v. Farnum,
73 S.C. 165, 53 S.E. 83 (1905) 23, 24

Sternberger v. McSween,
14 S.C. 325 (1880) 16, 17

Stroup v. Willcox,
549 U.S. ___ (2006) 26

Thompson v. Chapman,
107 S.C. 461, 93 S.E. 142 (1917) 14

Wheeler v. Wheeler,
111 S.C. 87, 96 S.E. 714 (1918) 14

STATUTES

S.C. Code § 1-3-30 ..... 6, 18

S.C. Code § 30-1-10, *et seq.* 15

S.C. Code § 30-1-10(A) 7

S.C. Code § 30-4-20(a) 17

S.C. Code § 30-4-20(c) 7, 17

Act No. 4754, 1865 (S.C.) 19, 24

RULES

Fed. R. App. P. 27 26

Fed. R. App. P. 35 27

Fed. R. App. P. 40 27

Fed. R. Bankr. P. 8011 25

OTHER AUTHORITIES

South Carolina Constitution of 1790, Article II, § 12 19

43 Op. Atty. Gen. 11 (1974) 20

1959 W.L. 10669 (S.C.A.G.) 19

1965 W.L. 11245 (S.C.A.G.) 19

Black's Law Dictionary, Fifth Edition, 1979 9

Webster's New International Dictionary,
Second Edition, 1957 9

STATEMENT OF THE CASE

This matter is before the Court on a Petition for a Writ of Certirorari from the United States Court of Appeals for the Fourth Circuit. On August 16, 2004, Respondent Thomas L. Willcox filed an application and Petition in the United States Bankruptcy Court for the District of South Carolina under Chapter 11 of the Bankruptcy Code, and on October 12, 2004, the Respondent filed an Adversary Proceeding to Determine to Personal Property and to Declare Personal Property as the Property of the Estate. The Appellant and other Respondents answered and asserted various defenses and claims in this matter.[1] After extensive discovery, and entry of Orders denying Appellant State of South Carolina's Motion to Abstain or for Certification of Questions to the South Carolina Supreme Court, a Joint Pre-Trial Order was entered, and the case tried on June 6th and 7th, 2005, in Charleston, South Carolina.

On August 15, 2005, the Bankruptcy Court issued its Order finding that the documents were not the property of the bankrupt's estate, that the State of South Carolina owned the documents in question, and that the State of South Carolina's Motion to Certify Questions was rendered moot, or, in the alternative, denied. This case was appealed to the District Court with the filing of the Notice of Appeal on August 24, 2005. After briefing by the parties, the decision of the Bankruptcy Court was reversed by the District Court's Order of January 12, 2006. Appeal to the United States Court of Appeals then followed.

The Fourth Circuit, after briefing and oral argument, issued its Opinion on October 27, 2006, which is published

---

[1] It should be noted that Respondents John M. Willcox and Kathryn Willcox Patterson claim an ownership interest to the documents in question; however, by agreement of the parties and with the Bankruptcy Court's approval, these Respondents did not appear at or participate in the trial, nor will they take an active role in this proceeding. These Respondents' claims have been severed from this proceeding and will be addressed by later proceedings by the Bankruptcy Court as is necessary.

at 467 F.3d 409. The Court, applying South Carolina common law, found that the possession of the documents by the Respondent and his family for some 140 years raised a presumption of ownership in his favor. As the Appellant did not come forward with evidence of either title or recent possession, it could not rebut the presumption of Respondent's ownership through possession. The Court also noted the Respondent's defenses of statute of limitations and staleness, but did not address those issues given the Appellant's failure to establish title superior to that of the Respondent.

As for the factual background of this matter, Respondent Thomas Law Willcox is a citizen and resident of Seabrook Island, Charleston County, South Carolina. Mr. Willcox was a businessman and contractor most of his working career, but is presently semi-retired and not working due to personal health problems, and health problems with his wife and her family. (J.A. pp. 225-228).

Respondent Willcox is the great-great-nephew of Confederate Major General Evander McIver Law. Respondent's family history is as follows. General Law, originally of Darlington, South Carolina, served with distinction in the Civil War, eventually becoming a Confederate Major General before the war ended. He participated in the battles of First Bull Run, Seven Pines, the Seven Days Battles, Second Bull Run, Antietam, Gettysburg (Round Tops), Chickamauga, Chattanooga, Wilderness, Spotsylvania, and Cold Harbor. (J.A. pp. 27, 33). After his wounding at Cold Harbor, he was involved in the evacuation of Columbia in February of 1865, before its capture by Federal forces led by General Sherman. (J.A. p. 229).

After the Civil War, General Law lived for a time in South Carolina and Alabama, then in 1881 he moved to Bartow, Florida, and established the South Florida Military Institute, a military college modeled after the Citadel. The school closed in the early 1900s after becoming a public institution, and it became a part of the University of Florida

system. For the remainder of his life, General Law served, variously, as a Trustee of Summerlin Institute, a Member of the Polk County Board of Education, and as Editor of the Bartow Courier-Informant. He passed away in 1920 and is buried in Bartow. (J.A. pp. 228, 260-262).

At some point, General Law came into the possession of the subject papers and documents. They consist of a large number of documents concerning Francis Pickens and M.L. Bonham, former Governors of South Carolina, various confederate military dispatches and reports, correspondence and telegrams between various Confederate generals, officers, servicemen, and government officials, and related documents and materials. At present, the collection is in excess of 400 documents.

The papers came into the possession of the Willcox and Law families by being given to Miss Blanche C. Law (Respondent Willcox's great-aunt and sister of his grandmother Elizabeth) by General Law's descendant, Mrs. Annie J. Storm. Respondent's great aunt, Miss Law, was the daughter of Colonel J.A. Law and niece of E.M. Law. She lived her entire life in Darlington, South Carolina. Upon Respondent's great-aunt's death in 1964, the papers were passed to his father (James Carter Willcox), and then to Respondent Willcox. Specifically, Respondent Willcox, after the death of his step-mother, found the documents in a bag in the top of a closet after the Columbia, S.C. family residence had been cleared of other personal property. (J.A. pp. 230-233).

It is unknown exactly how, when, why, where, and by what means General Law came into possession of the documents. (J.A. pp.564-565). However, there is no evidence that General Law illegally obtained these documents, or held the documents when he should not have, or otherwise improperly obtained or retained them. (J.A. p. 264).

The Willcox and Law families have preserved, protected, and organized the documents for approximately the last 140 years. No person, party, entity, or government has ever requested the return of these documents from Respondent Willcox or his ancestors until shortly before the filing of the Chapter 11 proceeding.

Respondent Willcox has previously attempted to sell the documents to various persons, as well as the South Caroliniana Library and the South Carolina Historical Society. His efforts were largely unsuccessful. Accordingly, on May 27, 2004, he entered into a contract, through his company, the Haulover Development Corporation of Johns Island, South Carolina, to auction the Civil War era correspondence. Respondent was using the company for reasons of privacy and to also more effectively order his business affairs. (J.A. pp. 235-236).

Pursuant to the auction agreement, the auctioneer, Dr. Bill Mishoe, had marketed and advertised the auction through placing notices and copies of certain documents to be auctioned on his Internet site and also placed advertisements in industry publications to notify interested persons of the items to be auctioned, and later the time, date and place of the auction. The Associated Press and other news outlets were contacted to make it known there would be an auction, and the subject of the items to be auctioned. Dr. Mishoe expended significant sums in these advertising and marketing efforts. (J.A. pp. 280-283).

On Tuesday, July 27, 2004, Appellant Rodger Stroup, the Director of the South Carolina Department of Archives and History, contacted Dr. Mishoe to discuss these documents. Specifically, he came to the auction house on that date and discussed this matter with Dr. Mishoe. Defendant told Dr. Mishoe at that time that he was being urged to claim these documents and letters, but that he was not interested in doing so. Dr. Stroup further said that while he as not interested in obtaining the actual letters, he would like permission to make a microfilm record of them before

they were sold. Dr. Stroup, at trial, did not deny that this conversation took place. (J.A. pp. 283-284, 571-572).

Based upon that conversation, Respondent Willcox authorized his counsel, Kenneth C. Krawcheck, Esq. of Charleston to allow the copying to take place. Mr. Krawcheck contacted Dr. Stroup directly and made arrangements on this understanding for the microfilming to occur. Furthermore, Mr. Krawcheck personally brought the documents to the South Carolina Department of Archives and History as a courtesy to Dr. Stroup and the State of South Carolina and allowed all of the documents to be microfilmed at that time. This microfilming took place during the afternoon of Thursday, August 5, 2004. All of this was done as an accommodation to Dr. Stroup and the State, and so that an historical record of the documents could be preserved by the State. (J.A. pp.237-239, 284-286).

The auction of these documents was scheduled for Saturday, August 7, 2004. After the microfilming of the documents and without any prior notice or notification, on the morning of Friday, August 6, 2004, Dr. Stroup and the Attorney General's Office for the State of South Carolina obtained a Restraining Order in South Carolina Circuit Court preventing the sale of the documents. Mr. Willcox and Dr. Mishoe both believe that the documents would have brought in excess of $1 Million at auction. The documents have previously been appraised at approximately $2.4 Million. (J.A. pp. 273-274, 285-286).

Respondent Willcox, at this point, was in severe personal and financial straights. He wished to auction these documents anonymously as he did not want to have the glare of publicity due to his and his family's health problems, his natural desire for privacy, and his financial troubles. He had a number of unpaid debts, including two mortgages and notes which were not current. Each of these properties were in foreclosure, and his personal residence was scheduled for a foreclosure sale on August 20, 2004 by the Master-in-Equity for Charleston County. The auction, Mr. Willcox

believes, would have brought in sufficient funds upon which he and his wife would have enough to live, to pay off these and other debts, and to save his home. The last minute issuance of the Restraining Order at the behest of the State of South Carolina affected Mr. Willcox adversely from both a privacy and financial standpoint, and led directly to his bankruptcy filing. (J.A. pp. 235, 239).

Trial testimony revealed that of the 72 Proprietors, Colonial, and State Governors and Executives through the Civil War era (1670 to 1866), the State Archives has in its possession exactly one original set of Governor's documents. These are of Governor Edward Drayton, who served two terms as Governor from 1800-1802 and 1808-1810. (J.A. pp. 236,428, 560). The reason for this is that there were no record keeping requirements applicable to Governor's records, and that the Governors simply left office with their papers when their term of office was ended. Governor Drayton's records apparently survive and are kept at archives because he felt strongly that a Governor should be required to keep records for his successor, despite the practice at the time. He even proposed by message to the legislature that a law be passed requiring Governors to keep and maintain permanent records. (J.A. pp. 323-324, 561). Interestingly, the legislature did not pass any such law. Furthermore, the Archives witnesses do not know if Drayton left his records with the State, or if they were later donated by his family or other individuals. This is likewise true of all Governor's materials held by Archives, at least until relatively recently. (J.A. pp. 425-426).

In late 1865 the Legislature passed a bill to provide for certain record keeping requirements by Governors. However, this law, and its present day successor, merely requires a Governor to maintain certain records- it does not speak to ownership. See S.C. Code Section 1-3-30. After the commencement of Reconstruction (1868), Governor's records then begin to appear in the records kept at Archives; however, individual Governors have to the present kept and

disposed of their records as they have seen fit. For instance, Governor Perry (1865) took his records with him, and they are deposited in large part in the Southern Historical Collection at Chapel Hill or in the Alabama State Archives. (J.A. pp.439). Even in modern times, Governor's records are not necessarily found at Archives. For instance, Governor Thurmond sent his records to Clemson. Governor Hollings sent half of his Governor's records to the University of South Carolina. Governor McNair sent the bulk of his records to the University of South Carolina. (J.A. pp.311-312). To this day there is no requirement that a Governor deposit his records at Archives at the end of his service. Significantly, the word "Governor" is not used even once in the several hundred pages of the Archives Act or the Regulations promulgated under the Act, nor is it included in the definition of public record found in S.C. Code Sections 30-1-10(A) and 30-4-20(c).

During the post Civil War period there is some indication that Governors Bonham and Magrath knew that some Governor's documents had survived the war, and were being held by various Governors, or were being distributed back to them. This can be discerned from correspondence between former Governors Magrath and Bonham, dated May 11, 1883. (J.A. p.743). Accordingly, there seems to be some effort on the part of the Governors at the time to make sure that certain materials were not kept as public records. Furthermore, General Law sold a portion of his collection and papers to a New York book dealer (a Mr. Coster) in 1895 or 1896, and then the dealer sold those documents to the Library of Congress around 1905, where they are still on deposit. (J.A. pp. 318-322, 746). These records, at the Library of Congress, are described as the Pickens/Bonham papers, and are undoubtedly documents and materials received by General Law at the same time he received the materials under litigation, most likely in 1865. In fact, the papers at issue in this case were also sent by General Law to that same dealer, and General Law changed his mind and

asked for their return as he no longer wished to sell them. This is reflected in correspondence from General Law to Mr. Coster, dated February 16, 1896. (J.A p. 746). Obviously, the existence of the papers was well known for some fifty years after the end of the Civil War, and there were no particular secrets about the nature of the papers or the identity of their possessor. Additionally, it nearly goes without saying that General Law acted at all times as the rightful and lawful owner of the papers, and exercised unfettered rights of ownership, including the right to sell them. (J.A. p. 118).

At trial and in appellate proceedings, the State argues from and presents a relatively detailed factual history of related documents, the evacuation of Columbia, and post Civil War investigations. The State originally asserted, without factual foundation, that executive papers were loaded on a railroad car for evacuation to Chester, South Carolina. However, these alleged occurrences were not factually substantiated at trial. Furthermore, while the State argues that the "Report of the Special Joint Committee, in Regard to Certain Public Property on Hand at the Evacuation of Columbia" (1866) shows that the State made efforts to recover records, including executive records, after the Civil War, the report is unclear in several important respects. (J.A. p. 994). It indicates, in part, that the State has not been able to determine what happened to executive records, but then also states that all records of the state were saved and returned to their respective offices. The report does not state what happened to executive records before, during, or after the evacuation of Columbia. Finally, the States witnesses at trial admitted that General Law may have been given the records by legislative act or at the Governor's express direction, but that given the chaos attendant with the evacuation, there was no way to know with certainty what occurred with regard to the records. (J.A. pp. 432, 565).

At trial, evidence was admitted that describes how the documents in this case came to be microfilmed by the

Southern Historical Society, at the University of North Carolina, Chapel Hill, in the late 1940's. (J.A. pp.254-255). Specifically, this evidence consists of 21 letters and telegrams to and from Mrs. Annie J. Storm (General Law's granddaughter) and the Executive Directors of the Southern Historical Society. (J.A. pp. 748-773). In the correspondence, Mrs. Storm and the Society are considering and negotiating over whether and on what terms the papers should be loaned or sold to the Society. Inteerestingly, the papers are variously described as both confederate records and as state house documents. A key passage in a letter dated November 12, 1948 from Mrs. Storm to Mr. J.G. de Roulhac Hamilton describes the documents as "Original State House papers entrusted to my grandfather at the time of the surrender." (J.A. p. 767). Another letter, between Mrs. Storm and a representative of the State of South Carolina, Dr. R.L. Meriwether, describes the documents as being "entrusted to my grandfather, Maj. Gen. E.M. Law for safe keeping at the time Sherman entered Columbia." (J.A. p. 784). Accordingly, General Law did not accidentally end up with the papers, but instead was given them purposefully, and presumably by Governor Magrath, who certainly had the authority to do so.[2]

Close examination of the Storm/Chapel Hill correspondence led to the discovery of links between the Law family and the State of South Carolina in the late 1940's. This evidence consists of six letters by and between Miss Blanche C. Law, Mrs. Storm, and Dr. R.L. Meriweather concerning the collection of confederate documents which are at issue in this case. (J.A. pp. 782-

---

[2]"Entrust" is defined as to give over to another something after a relation of confidence has been established; to deliver to another something in trust or to commit something to another with a certain confidence his care, use, or disposal of it. Black's Law Dictionary, Fifth Edition, 1979. Also, it has been defined as to surrender something to another with a certain confidence regarding the care, use, or disposal of it. Webster's New International Dictionary, Second Edition, 1957.

787). Dr. Meriwether was a State employee as the Secretary of the South Caroliniana Library, which is part of the University of South Carolina, a public university. Examination of the Meriwether correspondence leads to the inescapable conclusion that the State of South Carolina knew of the existence of the collection of confederate documents since 1948. Furthermore, in addition to the State's knowledge of the existence of this collection, and their ability to inspect and apparent actual inspection of these materials, the correspondence also shows that the State could have purchased and otherwise acquired the materials in the late 1940's.

Dr. Scott Poole, Respondent's expert witness, offered substantial insight into the historical treatment of records and archives by the State of South Carolina, and an historical overview of the time periods in question. In his written report and trial testimony, he pointed out that until the last 25 years, the State Archives was relatively inactive in securing the State's records. (J.A. pp. 103-110, 810). Historically, private individuals and organizations were of primary importance in preserving materials. In fact, until 1905, with the creation of the "Historical Commission of South Carolina" (the forerunner of the present Archives department), there were largely no efforts to preserve public records by the State. Dr. Poole also noted, as did the State's witnesses, that the documents at issue in this case were of military significance, and concerned, in large part, troop movements and dispositions, supplies, officer's reports, and like matters. It was therefore not unusual that a high ranking confederate officer would receive documents of military importance in a military emergency, and then keep them when it was clear that the South would not rise again. Finally, Dr. Poole testified that the microfilming of the documents is of primary importance to the historian and archivist (as opposed to access to the originals), as this is the easiest and safest method of handling and researching the materials. (J.A. pp. 334-336).

In conclusion, Governor Magrath (or other persons in appropriate authority) apparently trusted the Provost Marshal, General Law, with the documents. In a time of chaos and surrender, sensitive military and political documents were given to the appropriate person to have them in those times- a Confederate Major General. After the war, General Law, in apparent accordance with the expectations of the participants in the events, kept, preserved, sold, and ultimately passed the materials down to his descendants, and did not do so in secrecy. The General's family, through the workings of time and the various estate distributions, received the papers, and then passed them down to Mr. Willcox, who now owns them.

SUMMARY OF ARGUMENT

The Court of Appeals and the District Court correctly found that the State of South Carolina is not the owner of approximately 444 confederate era documents, pursuant to either an alleged Public Records doctrine or to the State Records Act, and in accordance with established common law precedent concerning ownership and possession of personal property in South Carolina. Furthermore, the Court of Appeals and the District Court committed no error in finding that these documents, even if they originated in the South Carolina Governor's office, are private in nature. Additionally, while the Court of Appeals did not find it necessary to address the issues, the District Court correctly found that the common law defense of staleness and the statute of limitations bar any claim of ownership of these documents by the State.

The Appellant also makes two new arguments in their Petition that are not preserved for review. These each appear to involve the Court of Appeals and the District Court not certifying questions of law to the South Carolina Supreme Court. The State argues that the *Erie* Doctrine has been violated by the Fourth Circuit, and the opinion also conflicts with decisions of other Courts of Appeal. Regardless of how the State has couches these issues, they

were not raised in the lower courts and properly preserved for review.

Even were the new issues preserved for review, the Court of Appeals and the District Court committed no error on these issues. Each Court exhaustively analyzed South Carolina case and statutory law from the relevant time frame, and found that the State had no viable ownership claim. Long established South Carolina common law holds that undisturbed possession of personal property, particularly for a lengthy period of time, is prima facie evidence of title and ownership. The presumption could not be rebutted by the State, as Governor's records in South Carolina were not and are not public property, nor was there any other evidence to support the State's claim of title. Accordingly, Respondent submits that a Writ of Certiorari should not be granted.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS DOES NOT VIOLATE *ERIE RR v. TOMPKINS*

The Appellant raises, for the first time in its Petition to this Court, that the Fourth Circuit Court of Appeals violated *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) in rendering its decision. The State argues that *Erie* was violated through a narrow or incorrect reading of state law, for failure to certify a question of law to the South Carolina Supreme Court, and through applying "general law" rather than state law. The Court of Appeals committed no error on these issues.

An *Erie* issue may not be raised on appeal for the first time in this Court. The State did not preserve the issue, if any, on appeal from the District Court opinion, which contained a similar analysis of controlling state law as the Fourth Circuit decision. The State also failed to raise the issue to the Circuit Court in its Petition for Rehearing and Petition for Rehearing En Banc. Accordingly, it is

inappropriate to now make this argument, as it could have been, and was not, presented to the lower Courts.

The State makes the novel argument that *Erie* is jurisdictional, and may therefore be raised at any time. This is wholly unsupported by case law, and there appears to be no authority that supports this unique proposition. *Erie* addresses the substantive law to be applied by the Federal Courts in deciding state law claims. Subject matter jurisdiction, whether based on diversity or bankruptcy, is a separate body of law. One need read no further than the *Erie* opinion to find guidance on this subject. "[F]ederal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the state, unwritten as well as written." *Erie* at 73. Of course, it has long been the rule that *Erie* applies to bankruptcy cases. *See, e.g. Marshall v. Marshall*, 547 U.S. 293 (2006), (Applying substantive Texas law in Bankruptcy Court proceedings). The various Federal Courts' jurisdiction in this matter has been admitted by the State on page 3 of their Petition for a Writ of Certiorari. Subject matter jurisdiction and substantive choice of law issues are separate and unconnected issues. *See, e.g., Markham v. City of Newport News*, 292 F.2d 711, 717 (4th Cir. 1961). Accordingly, any *Erie* based argument is not jurisdictional and cannot be made at this late date.

As for the merits of any *Erie* argument, the Appellant contends the Appeals Court's failure to certify a question or to abstain from hearing the case led to application of South Carolina law in an unduly narrow fashion, and to application of "general law", instead of South Carolina law. Review of the legal basis of the Fourth Circuit decision shows these contentions to be without merit.

The Fourth Circuit and the District Court correctly found that the State of South Carolina is not the owner of these civil war era documents, as it could not overcome the presumption of Respondent's ownership through possession. The State has asserted ownership pursuant to either an

alleged Public Records doctrine or under the State Records Act. Specifically, the State did not meet its burden of proving superior title to the documents as there is no statute or case establishing that Governor's Records were public records prior to 1865, and that the records are not the property of the State as they were never in the possession of the Secretary of State. Accordingly, the presumption of ownership by the possessor could not be overcome by the Appellant.

South Carolina law concerning ownership of personal property, and the effect of time and possession, has long been set. Under *Collins v. Bankhead*, 1 Strob. 25 (S.C. 1846), lapse of time gives rise to the presumption of ownership. Furthermore, it is the policy of the law to have personal property vested as early as practicable, and not to favor remote or stale claims, after a long lapse of time. Possession, of course, is always prima facie evidence of good title to personal property. *Ex Parte Dort*, 238 S.C. 506, 121 S.E.2d 1 (1961); *Elliott v. Wilson*, 181 S.C. 406, 187 S.E. 825 (1936). Ownership of personalty is presumed from possession. *Wheeler v. Wheeler*, 111 S.C. 87, 96 S.E. 714 (1918); *Thompson v. Chapman*, 107 S.C. 461, 93 S.E. 142 (1917).

The burden of proof in this matter is bourne by the State of South Carolina. As possession carries a presumption of ownership, the burden is placed on the non-possessing party to prove superior title and right to possession. *Hammond v. Halsey*, 287 S.C. 46, 336 S.E.2d 495 (S.C. App. 1985). Furthermore, under *Hammond* the party with the burden of proving superior title cannot challenge the sufficiency of evidence to establish possessor's title, but must recover on the strength of its own title.

The State does not, and cannot, seriously contest Appellant's title based on these common law principles. Instead, the State asserts that the documents are public records pursuant to Title 30 of the South Carolina Code of Laws, or the common law, and must be returned to the State.

The District Court correctly found that the State's claims are without legal merit, and the Bankruptcy Court erred in finding the documents to be the property of the State. The District Court did so by properly applying the De Novo standard of review as to the questions of law. The Fourth Circuit, agreeing with the analysis of the District Court, affirmed the District Court.

Any claim by the Appellant under the Public Records Act, S.C. Code Section 30-1-10, *et seq.*, fails as the Public Records Act does not appear to have been enacted until the 1950's, and the earliest codification appears to be in the 1962 Code of Laws. It is patently impossible for a statutory system to apply to matters of personal property law that occurred some 100 years before the enactment of the statutes.

If the State has a viable claim, it must rest on the common law as it existed in and prior to 1865. There is no South Carolina authority, modern or otherwise, to support a common law State Records doctrine. The elements of this purported theory are that the State has a right of possession to documents, unless the documents were abandoned or transferred by an act of the Legislature. Appellant, in the proceedings below, primarily relied on a North Carolina case in support of its common law position, namely *North Carolina v. West*, 235 S.E.2d 150 (N.C. 1977). No other state, at any time, has adopted the doctrine advanced in *West*.[3]

West does not apply to the facts of this case. Firstly, it concerns two "Bills of Indictment", which are Court records which at some point were unlawfully removed from North Carolina Superior Court records. Such records were required to be kept in North Carolina. However, there is no law, custom, or practice that required the keeping of the documents at issue in this case. While the argument below will address the nature of these documents as originating

---

[3] No mention of the *West* case is made by the Appellant in their Petition for a Writ of Certiorari.

with the Governors of South Carolina, the historical record in South Carolina is devoid of substantial attempts to keep and maintain any State Government records until 1905, when the Historical Commission of South Carolina was created by the legislature. Dr. Poole, Appellant's expert witness, testified and submitted by way of his report that South Carolina, during the nineteenth century and before, simply had no interest in records preservation. To now find, retroactively, that there was a common law State Records doctrine is to ignore the history of how documents were treated and handled, and the private nature of collection and preservation efforts until the early 20th century.

What is particularly interesting is that there are clues in earlier South Carolina jurisprudence that a common law Public Records doctrine would not have been adopted if the issue were raised in the nineteenth century. In *Sternberger v. McSween,* 14 S.C. 325 (1880), the state Supreme Court discussed the ramifications of the removal of an agricultural lien from the records of the RMC Office. In that matter, an original record was filed, but the original lien itself was apparently given back to the lienor, instead of a copy. In the opinion, the Court stated that while it could not sanction the practice, neither could it condemn it. Of particular interest is the observation that "if private individuals are at liberty to remove [records] whenever they see fit, they necessarily lose their character as public records." *Sternberger* at 39. Accordingly, the entire framework of the analysis urged by the State, that Government records are somehow different than other types of documents and personal property, is not reflected in South Carolina case law. In the only case to address such matters, the state Supreme Court intimates that mere possession of a document can ripen into ownership, even of a Court or government record. Neither abandonment nor an overriding state ownership claim, in accordance with the alleged Public Records doctrine, is discussed by the Court. Accordingly, there is evidence, from the late 1800's, that South Carolina specifically did not have a Public

Records doctrine as a component of its common law at that time.

The State has also complained that the title of Respondent is defective as there is no chain of title, and the documents were merely entrusted to General Law. However, as set forth above, entrustment is defined as the surrender of property with a certain confidence concerning its care, use, or disposal. There is no indication that General Law could not dispose of the documents, or keep them, as he saw fit, and he always acted as if he were allowed to sell the documents if he wished. Under *Hammond*, the State's claim must stand or fall on its own merits. Doubts as to Appellant's ownership are no substitute for the lack of a viable claim by the State on its own merits. Under these circumstances, the presumption that the officer in question, namely the Governor or the some other official, did their duty must be assumed. *Sternberger* at 39. At this late date there is no evidence or cause to suspect the General Law did not properly come into ownership of the documents, and we must assume that was the legal, proper, and appropriate intention of the participants at that time.

The District Court and the Fourth Circuit correctly found that a common law Public Records exception and the State Records Act do not apply to the documents in this matter, and that records, papers, or documents originating in the Governor's office were private in nature. No statutory section in the State Records Act, nor any part or portion of the S.C. Code governing the State Archives, refers to Governor's or Executive Records. The definition of Public Record, found at S.C. Code Section 30-4-20(c), refers to the records of a public body. Reference to this definition, found at S.C. Code Section 30-4-20(a), shows that while it includes State agencies, it does not include the Governor's office. Accordingly, under the plain language of the act, these materials cannot be "Public Records," and the State has no claim to them under this theory.

The State relies on *West* to attempt to show that there is no Executive records exception to the Public Records doctrine. *West* is not controlling law for the following reasons. Firstly, the case does not concern Governor's records, but Court records. The Fourth Circuit and the District Court corrected the Bankruptcy Court's error in extending and applying the *West* decision far beyond the facts of that case.

Furthermore, *West* does not concern the collection and retention of documents that are private in origin. *West*, at 154. In this case, the evidence presented at trial clearly shows that Governor's records were and are private property. The State Archives has one out of seventy-two Governor's or executive records from the founding of the colony until 1866. Governor Magrath's records are at the South Carolina Historical Society in Charleston, a private institution. (J.A. p. 325). Portions of the records of Pickens and Bonham are at the Library of Congress. Perry's are in Alabama and North Carolina. Thurmond's, Hollings', and McNair's are, in whole or in part, where they wished them to be, and that is not at State Archives. To this day, the Executive is merely required to maintain records under S.C. Code Section 1-3-30; how the Governor disposes of such records is in his or her own discretion. No South Carolina authority, whether by code or common law, requires a Governor to turn over his records to any person or any state agency. In fact, the government of the State of South Carolina has always acted as if executive papers are private, and have only changed their position upon the filing of this case.[4]

---

[4]Two Attorney's General opinions have some bearing on this matter. The first concerns a request by an officer at Shaw Air Force Base in 1959 for letters between the Governor of South Carolina and the Secretary of War concerning the base between the years 1942 and 1945. An Assistant Attorney General wrote the officer that "he was advised by the Director [of Archives] that Governors either took with them or, to some extent, destroyed their papers, and only one Governor, that is Governor Strom Thurmond, now a U.S. Senator, gave the papers for perpetuity . . . ."

This is not to say that Governors were not supposed to make some record of their acts and activities. Under the Constitution of 1790, Governors would send "messages" to the legislature, and attach relevant documents to such messages to keep the legislature informed of his doings and to make a permanent public record of those affairs. The South Carolina Constitution of 1790, Article II, Section 12. At trial, it was revealed that this was how a Governor, under the law and practice of early State government, made a public and permanent record. (J.A. pp.328, 428, 559-560). This practice changed only when the law changed after the Civil War. (See Act No. 4754, 1865). Even were the record keeping requirements enacted in late 1865 applicable to ownership issues, the law was not changed until after Pickens, Bonham, and Magrath left office.[5]

Obviously, the precedent that Governors owned and did what they wished with their papers in now being ignored by the present Agencies involved in this litigation. 1959 W.L. 10669 (S.C.A.G.).

The second opinion is a request from the Director of Archives in 1965 for guidance on a request by the State of Georgia for the return to that State of their Colonial Charter. In order for Archives to convey the Charter to Georgia, the Attorney General advised that the Charter could be lent to Georgia, "with the assurance that the General Assembly would subsequently be requested to authorize the gift of the document at its next session." Accordingly, the State of South Carolina has not itself acknowledged the ownership rights of other states as to "their" documents, and instead has sought to have a bill passed divesting itself of ownership. Certainly, in this past situation, this State did not advance a public records exception to traditional personal property ownership law. 1965 W.L. 11245 (S.C.A.G.).

[5] It may be that all or many of the documents at issue in this matter are already preserved at State Archives. At trial it was revealed that through the messaging process set forth in the 1790 Constitution, and through other record keeping, that copies of the documents may already be at State Archives. However, Archives wants these documents because they are better organized and easier to use and examine than the materials already at Archives, and because Archives has not organized its records and is not sure what is in their collections.

There are further indications that Governor's records are private in nature. In 1801 then Governor Drayton sent a message to the legislature urging them to pass legislation to require Governors to maintain records for their use and that of their successors. The legislature declined to act on this request. Furthermore, there was not even an archival agency until 1905. Even were the records kept, there would be nowhere to store them, and no one with the legal authority to hold them.

Finally, it appears that executive records, in general, have always been considered private property. Legal authority for this may be found as far back as *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) in which Justice Story found that the personal papers of George Washington remained the property of his family. More recently, these issues have come up in connection with the personal papers of Richard M. Nixon. See *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). Presidential papers remain the personal property of the President, subject to reasonable regulation because of their importance for matters of national interest and security. 43 Op. Atty. Gen. 11 (1974).

These principles have only been fully explored in the D.C. Circuit's opinion in the Nixon matter. In *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992), the Court addressed directly the claim of ownership of former President Nixon to his papers. The Court, after an exhaustive analysis of the then present possession, location, and ownership of each President's papers, found that Nixon indeed had a "compensable property interest" in his papers. The basis of this holding was the that a property interest was created through and reinforced by uniform custom and practice. In other words, history matters, as Presidents always have exercised dominion and control over their presidential papers. *Nixon* at 1277.

The essential error of the Bankruptcy Court in its Order, and the flaw the Circuit Court and District Court corrected, is that the Bankruptcy Court adopted a *West*

based framework of analysis, which ignores South Carolina law, history, practice and custom. The legal analysis employed by the District Court, and then by the Fourth Circuit, considered the acts of the people at the time, found the controlling South Carolina common law principles both in that history and in the South Carolina law of the period. It goes without saying that the lengthy record set forth above, as to the States and the former Governors treatment of executive department records, supports the finding of private ownership by the Respondent of these documents. Such an application of both the unwritten and written substantive law of the State of South Carolina is not an *Erie* violation- It is exactly the outcome that *Erie* was intended to foster.

II. THE COURT OF APPEALS CORRECTLY DETERMINED SOUTH CAROLINA STATE LAW

Appellant argues that this matter should be reviewed under *Leavitt v. United States*, 518 U.S. 37 (1996), as the Fourth Circuit decision is a "plainly wrong" determination of state law. As Appellant acknowledges, this Court does not ordinarily review decisions applying state law. Examination of Appellant's arguments reveals that this case does not involve issues subject to review under *Leavitt.*

A. The Court Of Appeals did not erroneously depart from the Findings of Fact of the Bankruptcy Court

Appellant alleges that the Fourth Circuit erred in making findings of fact contrary to the Order of the Bankruptcy Court, or in making its own findings of fact without finding any of the Bankruptcy Court's facts to be clearly erroneous. Appellant's contentions are simply incorrect. Each of the allegations of factual error by the Fourth Circuit is, in fact, supported by the Bankruptcy Court findings.

Appellant's first specific allegations of inappropriate fact finding is that the papers contents and their production

are not in dispute, and that the records have public and private aspects. (467 F.3d at 415, n.2). The State seems to say that because the documents were Governor's records, they are public records, and this ends any further legal analysis. However, the Fourth Circuit also states in the footnote that the papers were produced in an official context, but that whether or not they are gubernatorial papers begs the question. When consideration is given to the entire footnote, it is clear that the Bankruptcy Court's fact findings were not altered or amended. The Fourth Circuit fully considered these fact findings, and then properly looked to South Carolina law to determine the legal status of the papers. This is not improper fact finding; it is, instead, the Court of Appeals applying the correct law to the facts of the case to render a just decision.

The State also asserts that the Fourth Circuit improperly found as fact that there is no evidence that the papers, in the period of 1865 and before, would have been considered executive or gubernatorial records. However, the State does not point to any finding of fact by the Bankruptcy Court that was ignored or altered in the Fourth Circuit opinion. The Court of Appeals properly noted the State's lack of evidence at trial that these materials were considered to be public records in the relevant time frame. For the Fourth Circuit to point out a lack of evidence as to the State's claims is not improper fact finding.

The State further complains that it was error by the Fourth Circuit to observe that various Executive Branch records are in places such as Clemson University or the University of South Carolina. Of course, the record has examples of similar documents also being in private collections. These matters are noted in the Bankruptcy Court Order, but were given little weight by that Court. (App. a.69-70). While the Bankruptcy Court found that there were no private aspects to the documents, this was legal error by that Court founded on its flawed interpretation if South Carolina law. For the Appeals Court to point out undisputed

facts in the context of the appropriate legal analysis is not improper fact finding.

As a final factual matter, the State complains that the Appeals Court did not give conclusive weight to the "docketing" of the documents. Docketing is not a controlling, or even a particularly important, factor in determining ownership. Docketing is simply a method of organizing documents- nothing more and nothing less. What the documents are, who possessed them, and how they have been treated are much more important than how the documents were potentially filed and organized at one limited point in time.

B. There is no South Carolina Case Law that Supports the Proposition that Governor's Records are Public Records

Appellant cites a number of cases in support of the proposition that the records of Public Offices are Public Records. However, no case is cited by Appellant for the proposition that Governor's Records are Public Records.

In support of this position, Appellant cites *State v. Farnum*, 73 S.C. 165, 53 S.E. 83 (1905). This opinion is misconstrued by Appellants as controlling law. It does not address the ownership of executive records. Also, it was also handed down by the South Carolina Supreme Court some 40 years after the events in question.

The exact legal issue before the lower Courts, no matter how presented, comes down to this simple question: In 1865, what was the law in South Carolina concerning a Governor's ownership of documents? No statute, case, or other authority, in this or any other State, in 1865 or before, can be cited for the proposition that the State of South Carolina owns these documents. The pre- Civil War case cited by the Fourth Circuit, *Pinckney v. Henegan*, 33 S.C.L. 250, 2 Strob. 250 (S.C. App. L. 1848), stands for the proposition that records in the possession of the Secretary of State's are public records. When the *Pinckney* case is read in

conjunction with the 1865 Act, it is clear that for these records to be Public Records they would have to be deposited with the Secretary of State, at the very least. Accordingly, the Fourth Circuit correctly found that *Farnum* did not apply to the facts of this case.

C. There is no Statutory Authority that Governor's Records are Public Property

The State argues that there is statutory authority for the proposition that early Governor's Records are Public Property. However, there is no statute cited by Appellant for this proposition.

Appellant lists some eight statutes or constitutional provisions purporting to show that the documents at issue in this case are Public Records. Certain of these statutes refer to records of the legislature, and to property and probate records. Other provisions speak to the Governor's duties and responsibilities, but none of them say anything about who actually owns a Governor's documents. Not until late 1865 was the issue of Governor's records addressed by the legislature, in detailing the keeping of records and their deposit with the Secretary of State. See Act 4754, Statutes at Large of South Carolina, Vol. XIII, Statutes at Large (rep. Printing 1875). Of course, this law, even if construed to apply to this matter, was enacted after the documents were made and General Law came into possession of them. It also does not address the issue of ownership of such materials.

D. Respondent's Defenses Bar the State's Claims

Even were the State able to make viable claims to the documents in question, there are still a number of legal theories and defenses available to the Appellant to defeat such claims. These include abandonment, waiver, estoppel, laches, unconscionable and inequitable conduct, staleness, and statute of limitations. The District Court found that common law principles and defenses, such as staleness and

the statutes of limitation, barred any claim of ownership of these documents by the State. The Fourth Circuit, in analyzing the case, did not address the issue as the State could not overcome the presumption of ownership through possession.

Given the present posture of the case, it does not appear that these issues will be before this Court, although they could potentially arise if there were a remand to the lower Courts for further proceedings. Nevertheless, the decision of the District Court applying these defenses to defeat the State's claim of ownership was correct. If necessary, Respondent will argue this position in future proceedings; however, Respondent's defenses do not appear to be issues in the case at this time.

III. THE COURT OF APPEALS' REFUSAL TO CERTIFY STATE LAW QUESTIONS DOES NOT CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT AND OTHER COURTS OF APPEAL

This issue is similar to the Appellant's *Erie* issue, and like that issue, it has not been preserved for review. Specifically, it was not raised as an issue on appeal in the lower courts. Furthermore, there is no conflict amongst the Circuits, as asserted by the Appellant.

The Bankruptcy Court, in its Order, denied the State's request for certification of questions of law to the South Carolina Supreme Court. The Appellant did not appeal this ruling to the District Court, and did not make a Motion for Certification under Rule 8011 of the Bankruptcy Rules of Procedure. The State chose not to file such a Motion, which was the proper vehicle for raising the issue. Instead, the State, in a footnote in their Brief, stated that they reserved their rights to make such a Motion in the event the Bankruptcy Court Order was not affirmed. (District Court Brief of Appellees, p. 28, n.17). Nevertheless, after the District Court decision, no such Motion was made.

The certification issue was not raised by the State on appeal to the Fourth Circuit. In their Brief to that Court, they stated that certification was an option if that Court wanted guidance from the South Carolina Supreme Court. (Fourth Circuit Brief of Appellants, p. 37, n. 9). A Motion, pursuant to Federal Rule of Appellate Procedure 27, was not filed by Appellant to request certification.

After the issuance of the Fourth Circuit opinion, the State's Petition for Rehearing and Rehearing En Banc requested certification. The Petition was denied by the Appeals Court, and the proceedings in this Court then commenced.

The Fourth Circuit properly denied the certification request by the State. It was not an issue on appeal, and the request was simply made too late–The Fourth Circuit had issued its opinion, and there was no question then left to certify. Furthermore, as Chief Justice Roberts (sitting as Circuit Justice) has already noted in the Opinion On Application For Stay, the Appellant's certification issue was only mentioned "in passing in the court below." *Stroup v. Willcox*, 549 U.S. ___ (2006). Chief Justice Roberts further noted that Appellant requested that the Fourth Circuit rule on the merits of the matter. (Fourth Circuit Brief of Appellants, p. 47). A similar request for a ruling on the merits was made by the State in the District Court. (District Court Brief of Appellees, p. 28).

Based on the forgoing, Respondent submits that this issue is without merit. The State requested from the District Court, and then from the Fourth Circuit, a ruling on the merits of the case. It elected not to file a Motion to Certify Questions of Law in either Court, and then, after the issuance of the Fourth Circuit ruling on the merits it had requested, finally asked for certification. Accordingly, this issue has not been preserved for review.

The State also argues that the failure to certify by the Fourth Circuit raises conflicts in principles of federalism

between the Circuits. This contention is without merit. There is no decision on certification by the Fourth Circuit from which the State may appeal. As a Motion to Certify was not made by the State, there is no decision to compare with the rulings of other Circuits. While the State's Petition for Rehearing and Rehearing En Banc included the issue, it was then outside the scope of Rules 35 and 40, Federal Rules of Appellate Procedure. To be succinct, certification was not an issue overlooked by the Fourth Circuit, because it was never raised on the appeal.

The State correctly notes in its Petition to this Court that certification is within the sound discretion of a federal court. *Lehman Bros. v. Schein*, 416 U.S. 386 (1974). Given the State's failure to actively raise and pursue the issue through two appellate levels, it is not an abuse of the Fourth Circuit's discretion to decline certification after the issuance of an opinion on the merits. Nor does the State argue that the Circuit Court's failure to certify is plain error. Accordingly, this issue is without merit.

CONCLUSION

For the foregoing reasons, Respondent Thomas Law Willcox requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

/s/

Kenneth C. Krawcheck
Krawcheck and Davidson, LLC
9 State Street
Charleston, S.C. 29401
(843) 577-2577
Attorney for Respondent
Thomas Law Willcox

March 26, 2007